



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 6, 1996

Mr. Rick Perry  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-2044

Dear Commissioner Perry:

You seek reconsideration of a previously issued Open Records Letter No. 96-1247 (1996) which has been assigned ID# 101865.

The Texas Department of Agriculture (the "department") received a decision from this office pertaining to a request for the following information concerning Holland Cotton Seeds:

1. How many acres Holland got certification for 1379
2. Confirmation that none of the varieties other than 1379 were requested for certification during 1994 and 1995.
3. Under the Texas Department of Agriculture the following varieties do exist.

. . . [listing several Holland varieties]

In this request for reconsideration, the department has submitted additional argument on behalf of the third party and a copy of the information at issue which we now consider along with an additional response from the original requestor.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . A trade secret is a process or device for continuous use in the operation of the business. . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concession in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup>

This office has held that if a governmental body does takes no position with regard to the application of the trade secret branch of section 552.110 to the requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. Our previous ruling considered the lack of department argument as well as the response of the requestor to the third party's prima facie argument, and these considerations led us to the conclusion that we now reaffirm. Neither the department nor the third party have established a prima facie case for trade secret information under the first prong.

Next, we examine whether the information is commercial or financial information excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 Cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

However, you have submitted additional clarification on behalf of the third party stating that "the agricultural niche of closed pedigrees for commercial seed growers is a highly specialized, very expensive field of operation." You contend that some growers are unwilling to have information regarding acreage published in the Texas Certified Seed Directory. Additionally the department asserts that divulging how many acres a Texas producer dedicates to a particular variety of seed allows the producer's competitor to gauge just how much of the particular seed variety the producer will market. You argue that access to the acreage would reveal the certified growers' marketing strategies and allow competitors to fashion their own initiatives accordingly. With the additional argument provided in asserting this reconsideration, we now determine that the department has made the required showing that the release of the acreage will cause substantial harm to the competitive position of the person from whom the information was obtained. Thus, we conclude that the commercial or financial information prong of section 552.110 does except acreage from disclosure so that the department may withhold the acreage in its entirety from the requestor.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Very truly yours,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/rho

Ref.: ID# 101865

Enclosures: Submitted documents

cc: Mr. Lanny Hamby  
Hamby, Mouton & Rheinscheld  
P.O. Box 2199  
Big Spring, Texas 79721-2199  
(w/o submitted documents)

Mr. Shamin Zaidi  
ARTECO-USA  
3150 Hilltop Mall Road  
Richmond, California 94806  
(w/o submitted documents)